No. 2618

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, copartners, doing business under the firm name of Kruse & Banks Shipbuilding Company, on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, INC., JAMES H. HARDY, HANS MICHELSON, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy", her tackle, apparel and furniture,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

E. B. MCCLANAHAN,
S. H. DERBY,
Merchants Exchange Building, San Francisco,
Proctors for Appellants and Petitioners.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein respectfully petition for a rehearing of the above cause upon the following grounds:

1. That the court, in its decision, apparently overlooked the main point argued by the appellants, to wit:

that the only excuse offered by appellees for the desertion of appellants' barge by the steamer "Hardy", *even if true,* rendered said steamer "Hardy" unseaworthy for her voyage, and hence made her liable to appellants.

2. That the court's *sole reason* for its decision, namely: that the state of the record was not such as to justify the reversal of the lower court on *disputed* questions of fact, has no application to the point made above in that said point was and is expressly predicated on the assumption that all appellees' testimony in regard to the same is *true.*

Argument.

The court's decision in this case divides itself into four parts:

a. A statement of the facts, which we do not now dispute;

b. A statement as to the law of towage, which we do not now dispute;

c. A statement of the findings made by the lower court;

d. The court's reasons for accepting these findings.

The fourth part of the above is all that we are now concerned with. It reads as follows:

> "While there are many features of the evidence which tend to discredit the testimony of the officers and men of the Hardy, and tend to prove that

on the night of the fifth or during the daylight of the sixth the lantern on the barge might have been lighted without danger to the men, and that in fact no watch was kept of the barge on the night of the sixth, we are not convinced that the record is such as to take the case out of the well settled rule which has been followed by this and other courts, that in cases on appeal in admiralty, *when questions of fact are dependent upon conflicting testimony,* the decision of the District Judge who had the opportunity to see the witnesses and judge of their appearance, manner and credibility will not be reversed unless it clearly appears to be against the weight of the evidence.'' (Italics ours.)

It is thus very apparent that the court decided this case solely upon the ground that it would not reverse the lower court on *disputed questions of fact.* The court, however, apparently overlooked the fact that the main point in the case *presented no disputed question of fact,* and hence the reasoning of the court is inapplicable to said point.

On page 21 of our brief the following appears:

''V.

THE 'HARDY' WAS GROSSLY NEGLIGENT IN FAILING TO MAKE A PROPER OR SUFFICIENT SEARCH FOR THE BARGE, AND HER ONLY EXCUSE FOR ABANDONING THE BARGE, EVEN IF TRUE, RENDERED HER UNSEAWORTHY FOR HER VOYAGE AND HENCE EQUALLY LIABLE.

The above is the main point in this case. It is our contention that the 'Hardy' made an absolutely insufficient search for the barge and abandoned her under most reprehensible circumstances. The lower court found that there was no negligence in this respect, but apparently *wholly failed to consider in this connection the utter insufficiency of the excuse*

> *offered for such abandonment,* to wit: lack of enough fuel oil to permit of further delay." (Italics ours.)

Following this statement we proceeded to argue that the "Hardy's" excuse that she did not have sufficient fuel oil to continue her voyage was untrue (Brief, pp. 21-25). This argument is now abandoned in view of the court's decision. After said argument, however, we proceeded to the principal point in the case, basing our contention *solely* on the testimony of our opponents and citing numerous cases to support our views. The gist of this argument will be found on pages 25 to 30 inclusive of our brief, and further reference to it is made on the following eight pages. We do not deem it appropriate to again repeat what is already in the records of this court and, therefore, merely call attention to our opening statement in regard thereto on page 25 of our brief:

> "We now propose to grasp the other horn of claimants' dilemma *and to proceed on the assumption that the 'Hardy's' testimony is true* and that she did not in fact have enough fuel oil to permit a further delay. If so, she was unseaworthy for her voyage and cannot escape responsibility *under her own testimony* (The Undaunted, 5 Asp. 580, cited infra)." (Italics ours.)

We believe, with all due respect to the court, that the above point (the main point in the case) was not given consideration. The point is in no way based on *disputed testimony,* but is based on *undisputed testimony.* It is a point in no way covered by the court's decision.

We expressly pointed out in our brief (p. 21) that the lower court failed to consider this question, and thereby hoped to direct it specially to this court's attention. As the record now stands the appellants have not had their day in court as regards their main point for reversal.

Appellants submitted this case without oral argument because they felt that the briefs fully covered the situation and would receive careful attention. Nor do we doubt that they did receive such attention, but we do believe that, in preparing its decision, the court must have forgotten that the point in question had been raised, for we do not believe that the court would have passed it over if it had had it in mind. The court expressly deals with the alleged negligence of the "Hardy" in failing to relight the light on the barge, and in not keeping a proper lookout (which were comparatively minor points), but it ignores the vital contention made by us that a sufficient search was not made after the barge was lost. Admitting that the court's reasoning implies that it accepts the finding that there was not sufficient fuel oil left to continue the search, it does not imply that the lack of sufficient fuel oil did not make the "Hardy" unseaworthy.

Appellants realize, in ordinary cases, the futility of presenting petitions for a rehearing after cases have had careful consideration. They feel also, however, that where a case has not had full consideration, and a vital point has been overlooked, this court will recognize the injustice to them of letting the decision stand and promptly correct that injustice.

For the above reasons, and accepting the court's decision as far as it goes, appellants respectfully ask for a rehearing on the points presented by this petition and on those points alone.*

Dated, San Francisco,
February 10, 1916.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellants and Petitioners.

Certificate of Counsel.

We hereby certify that we are counsel for the appellants and petitioners in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,
February 10, 1916.

E. B. McClanahan,
S. H. Derby,
Of Counsel for Appellants and Petitioners.

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*Affiliated with the point herein specifically presented is our claim that the lack of enough fuel oil to take the "Hardy" to **San Francisco** was not the proper criterion of her right to desert her tow while near **another** safe port, Fort Bragg (Brief, pp. 27, 30). This claim is also not passed on by the court and we simply wish to note it in passing, and ask a reconsideration of it also, if the petition be granted.